

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-8112

TO BE ARGUED BY
THOMAS M. BREEN

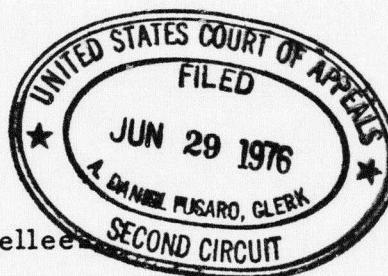
AMALIA HEBIRA ZORIANO SANCHEZ,
etc., et al,

Plaintiffs - Appellants.

--against--

CARIBBEAN CARRIERS LIMITED,
BORDAS DOMINICAN CO.
BORDAS & COMPANY and
BORDAS CORPORATION,

Defendants - Appellees



On Appeal from the United States District
Court for the Southern District of New
York.

BRIEF OF PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants,

=against=

CARIBBEAN CARRIERS LIMITED,
BORDAS DOMINICAN CO.,
BORDAS & COMPANY
BORDAS CORPORATION

Defendants-Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS

The Issues Presented for Review

1. Should the plaintiffs have a hearing to show that they have made proper service on the defendants ?
2. Should the plaintiffs have adequate discovery to show the existence of sufficient United States contacts for the application of American law to this case ?
3. Whether the judgment of dismissal for lack of jurisdiction by the United States District Court of Puerto Rico - after the Court of Appeals of the First Circuit has stricken the words "with prejudice" from that judgment - prevents the plaintiffs from continuing this lawsuit ?

STATEMENT OF THE CASE

This is an appeal by plaintiffs -personal representatives of the estates of deceased seamen - from a Memorandum decision and Order of the United States District Court for the Southern District of New York, Honorable Kevin Thomas Duffy, U.S.D.J., dated January 20, 1976 (123-126a), a judgment entered thereon (127a), and the endorsement dated February 18, 1976 (129a) on the motion of the plaintiffs for reargument (128a). *

On August 21, 1975, this complaint of the plaintiffs against the defendants (6-19a) was filed in the Southern District of New York. The plaintiffs requested money damages for the personal injuries and deaths of deceased crewmembers of the M. V. CARIBE when she sank about October 10, 1971 (7a). In the complaint are seven causes of action: Two under the Jones Act (46 U.S.C.A. 688) for personal injuries, (6-11a) and for death (12-13a); two under the General Maritime Law for personal injuries (12a) and for death (13-14a); two under the law of Liberia (14-18a), and the 1958 Geneva Convention (17-18a) for personal injuries, and for death (18-19a); one cause of action under the Death on High Seas Act (19a).

A motion was filed by the defendants on September 11, 1975 to dismiss this complaint.

* References are to joint appendix submitted by the plaintiffs-Appellants unless otherwise indicated.

In a memorandum decision and order (123-126a) of the District Court of the Southern District of New York two main grounds were set forth for dismissing the complaint of the plaintiffs :

1. An appeal then pending in the United States Court of Appeals for the First Circuit from an order of the United States District Court of Puerto Rico (124-125a).
2. Improper service of the summons and complaint in the action in the Southern District of New York (125-126a).

At page 127a is the judgment entered on the basis of the memorandum and order (123a-126a).

In the Southern District of New York the Docket Number of this case is 75 Civ. 4166.

After the plaintiff moved for reargument (128a) with reference to proper service of process on the defendants, the Court granted the motion for reargument (129a). Because of the pending appeal in the First Circuit the District Court decided to continue to decline to accept jurisdiction of this action.

On January 21, 1972, the plaintiffs instituted an action against the same defendants in the United States District Court for the District of Puerto Rico (41-57a). In the Puerto Rican lawsuit the defendants moved that Court to dismiss the Puerto Rican action for lack of jurisdiction.

Through an opinion dated April 17, 1975, by Hon. Jose V. Toledo Chief U.S. D.J., the District Court of Puerto Rico dismissed that action

with prejudice (civil 87-72 and 894-73) (34-10a).

Then the plaintiffs appealed from that order of the District Court of Puerto Rico to the United States Court of Appeals for the First Circuit (75-1263). A Per Curiam decision dated February 17, 1976 ordered that the judgment of the District Court of Puerto Rico be affirmed "except the words "with prejudice" are stricken" (135-136a) from the District Court Judgment.

STATEMENT OF THE FACTS

Plaintiffs are personal representatives of the estates of the deceased seamen who died when the M. V. CARIBE sank about October 10, 1971, on the high seas. On behalf of surviving dependents the personal representatives brought this lawsuit to recover damages for the personal injuries and deaths of the decedents. The suits are based on the Jones Act (46 U.S.C.A. 688), the General Maritime Law, Liberian Law and the 1958 Geneva Convention, and the Death on High Seas Act (46 U.S.C.A. 761-768) (5-19a).

Before June 25 of 1971, the defendant Caribbean Carriers Limited was the record owner of the vessel M. V. CARIBE, which then flew a Liberian flag (30-31a). In that month this defendant attempted to transfer the vessel to the ownership of the defendant Bordas Linea Dominicana, and to the flag of the Dominican Republic (58-61a). According to the records of the Commissioner of Maritime Affairs of the Republic of Liberia at 103 Park Avenue, New York City, the M. V. CARIBE was enrolled and registered as a Liberian vessel until October 22, 1971 -12 days after the ship sank (69a).

Because Caribbean Carriers Limited did not comply with the provisions of the Liberian Maritime Law and the Liberian Maritime Regulations, and surrendered the vessel's Certificate of Registry, the Ship Radio Station License, and the Bill of Sale in triplicate, the attempted transfer was void (17a). In addition, the attempted transfer violated the rules

of the Geneva Convention of 1958 (17-18a). Under Liberian Law, the personal representatives of deceased seamen have causes of action on account of personal injuries sustained by the decedents for unseaworthiness under the Non-Statutory General Maritime Law of the United States (16a), and for the death of the decedents under Section 337 of the Liberian law (18-19a).

This cause of action on the effect of the invalid transfer of the vessel and the effect of the 1958 Geneva Convention was not included in the Puerto Rican complaint between the same parties.

The U.S. Coast Guard conducted a search for the M.V. CARIBE when she was reported missing. After the U.S. Coast Guard declared that it could not find the vessel, this agency stated that the vessel was riding below her Plimsoll Marks and probably capsized (61a). With reference to the ownership of the vessel by U.S citizens, Luis Manuel Bordas testified on his deposition in Puerto Rico on July 10, 1974, that the three directors of Caribbean Carriers Ltd., were Byron King Callan (a U.S. citizen), Luis Manuel Bordas (dual American and Dominican citizenship) and Diego Bordas (62a).

The witness stated that the same three men were stockholders of the same company.

When the defendant Caribbean Carriers Ltd. was listed as the owner of the M.V. CARIBE its address was in care of Bordas & Co. Apartado 4615 Acacia No. 5, Urb. Monterrey, Pueblo Viejo, San Juan,

Puerto Rico 00902 (62a).

The M. V. CARIBE was financed through sources in New York as the following extracts from the mortgages on file at the Commissioner of Maritime Affairs of Liberia at 103 Park Avenue, New York indicate:

FIRST PREFERRED SHIP MORTGAGE-(70a)
May 16, 1967

OWNER: CARIBBEAN CARRIERS LIMITED c/o Bordas Corporation 98 Front Street, New York, New York, MORTGAGEE: THE MASTAN COMPANY, INCORPORATED (Delaware, U.S.A.) 640 Fifth Avenue, New York, New York, initials of Diego E. Bordas (70a).

AMERICAN BUREAU OF SHIPPING Classification for vessel (80a)
Rights and remedies under laws of Republic of Liberia and the United States (85a).

Notice of Sale in New York Newspaper (86a).

Owner appoints Bordas Corporation, a New York corporation, whose principal office is at 98 Front Street, New York, New York as its agent for service of process in action by mortgagee. (91a).

Appointment of substitute corporation as agent in New York City -signature
E.
of Diego/Bordas (92a).

Acknowledgement and affidavit of good faith by Diego E. Bordas in State of New York, County of New York (93a).

Note for \$109,000.00 payable by Caribbean Carriers Ltd. in New York City (94a).

SUPPLEMENTAL INDENTURE TO FIRST PREFERRED SHIP MORTGAGE

(95a).

February 8, 1968

Increase in interest rate to mortgagee by New York commercial banks,
interest on mortgage to be increased proportionately (97a). Indebtedness
in U.S. Currency (98a).

Signature of Diego E. Bordas on behalf of Caribbean Carriers Limited
(100a).

Acknowledgement by Diego E. Bordas in State of New York, County of New
York; residence given as Acacia No. 5 Newport, San Juan, Puerto Rico
(101a).

Affidavit of Good Faith by Diego E. Bordas (102a).

Interest increase in rate chargeable to holder of note by New York commer-
cial banks, proportionate increase to debtor (103a). (exhibit B)

SECOND SUPPLEMENTAL INDENTURE TO FIRST PREFERRED SHIP
MORTGAGE February 27, 1969 (105a)

Increase in interest rate chargeable to mortgagee by New York commercial
banks, proportionate increase to mortgagor (106a).

Signature of Diego E. Bordas on behalf of Caribbean Carriers Limited in
New York City (109a).

Acknowledgement of execution of instrument in State of New York, County
of New York on February 27, 1969 by Diego E. Bordas; address given as
Acacia, No. 5, Newport, San Juan, Puerto Rico. (110a).

Affidavit of Good Faith by Diego E. Bordas in County of New York, State of
New York. ~~████████~~.

Exhibit "A" note signed by Diego E. Bordas in New York City, payable to holder at 640 Fifth Avenue, New York City. (112a).

Exhibit "B" note signed by Diego E. Bordas on February 8, 1968 payable to the Mastan Company, Inc., at 640 Fifth Avenue, New York City. (113a).

Exhibit "C" note signed by Diego E. Bordas for Caribbean Carriers Limited payable at 640 Fifth Avenue, New York City. (114a).

P O I N T I

THE PLAINTIFFS HAVE PERFECTED SERVICE ON
THE DEFENDANTS UNDER RULE 4 AND THEY SHOULD
HAVE A HEARING TO SHOW PROPER SERVICE

In the instructions to the United States Marshal for the District he was directed to serve Byron King Callan, Esq. a Vice-President for the defendant Caribbean Carriers Limited. Mr. Callan's affidavit (28-29a) declares that process was served on an associate in his firm and not upon Mr. Callan. Further he went on to say that he had resigned his position as a Vice-President with Caribbean Carriers Limited -but he did not mention whether his resignation had been accepted and whether anyone had been appointed in his place. From the investigation of these defendants by the plaintiffs' attorney, it was evident that all the defendants were intertwined and they all would have notice of this law-suit through this service (62-64a).

Without conceding the validity of the objections to service, the plaintiffs then effected service upon the defendants in the following manner:

1. Obtaining an order from the Court permitting Eugene Stack, Esq. to serve Caribbean Carriers Limited through a statutory agent -International Trust Company of Liberia , in Monrovia, Liberia (5r) Mr. Stack filed his affidavit of service dated November 12th, 1975, with a letter which he received from the International Trust Company of Liberia (14r).
2. From this Court an order was obtained permitting the plaintiffs

to serve the New York Corporation -Bordas Corporation through the Secretary of State in Albany, New York, (6r). According to his affidavit dated September 30th, 1975, Dennis Mader served the process on the Secretary of State of the State of New York, (15r). This is in accord with the New York statute which permits such service even after a corporation has been dissolved. (Business Corporation Law 1006, (4)).

3. Through the Clerk of this Court, as permitted by F.R.C.P. Rule 4 (i) (1) (D) the defendant Bordas Dominican Co. was served by registered mail. The Clerk's affidavit is dated September 26th, 1975, on this service, (8r).

4. Service on Bordas & Company. Order were obtained from the Clerk of this Court :

- (a) Order dated October 10th, 1975 , Luis Ramires to serve Bordas & Company, in Puerto Rico under F.R.C.P. 4 (c);
- (b) Another order dated December 23rd, 1975, permitting the same Luis Ramires to serve the same defendant Bordas & Company in Puerto Rico (18r). Mr. Ramires served the proper defendant in Puerto Rico, on January 22nd, 1976.

The plaintiffs made strenuous effects to serve all the defendants; if the defendants were not properly served the plaintiffs should have been given another opportunity to make further service.

Monteiro v. Sociedad Mar. San Nicolas, S.A. et al., 254 F. 2d

514 (2 Cir. 1958).

The District Court quashed the service of process and dismissed the Libel -plaintiffs appealed on the ground that service had been made on an agent for the respondents. At page 517 of the opinion the Court stated :

"(2) However, since it cannot be determined from the record in the case at bar whether the Marchessini corporation did in fact continue the business activities of Petmar Agencies, Inc., after 1955, and, if so, the extent to which Marchessini corporation acted as agent for respondent, a hearing is necessary to determine the validity of the service. This hearing should be held before the District Court and not before a Commissioner." *** citations omitted.

The judgment of the District Court was reversed and the same case remanded for a hearing "to determine the validity of the service of process" (p. 517).

Grammenos v. Lemos, 457 F. 2d. 1067 (2 Cir. 1972)

In the District Court the complaint in this action had been dismissed on the ground of lack of personal jurisdiction and forum non conveniens. At page 1069 the Appeals Court stated the following :

"We find that the quashing of service was proper, but that the complaint ought not have been dismissed, as the plaintiffs may attempt to obtain service through methods other than one already tried. We find forum non conveniens an inappropriate ground for dismissal."

Continuing its discussion on service, the Court declared at page 1071 :

"(6-9) This is not to say, though, that substituted service would not prove effective; appellants did not attempt to utilize that

method in this case. We cannot predict, of course, whether such an attempt would meet with success. But the fact of invalidity of the one attempt at service does not automatically require dismissal of the complaint. The mere lapse of time between the date of filing of the complaint and the date of effective service does not cause the complaint to abate. Messenger v. United States, 231 F. 2d. 328 (2 Cir. 1956). And the Court has power, under Fed. R. Civ.P. 4 (a), if the service is invalid or improper, to cause additional or new summons to be issued and good service attempted " *** " Appellants in this case ought to be given an opportunity to perfect service on Lemos. "

The concluding sentence of the Court is on page 1074 :

" These issues will be relevant only if appellants obtain valid service over one of the parties. We reverse the dismissal of the complaint and remand for reinstatement so that appellants may attempt to remedy the defects in service."

The plaintiffs should have given another opportunity to remedy any defect in service of the summons and complaint upon the defendants, if the Court should decide that service was not complete.

P O I N T II

THE PLAINTIFFS HAVE SERVED NOTICES OF DEPOSITIONS, A NOTICE TO PRODUCE AND SHOULD NOT BE FORECLOSED FROM DISCOVERY IN ORDER TO SHOW SUFFICIENT UNITED STATES CONTACTS EXIST IN THIS CASE.

Plaintiffs have served the following :

1. A Notice to Produce Documents.
2. Notice of taking deposition of Byron K. Callan, Esq.
3. Notice to take the testimony of an expert on Liberian Law.

The plaintiffs want to proceed with this discovery -including another expert on Liberian Law - because the first witness has since died. When the defendants requested that this Court not take jurisdiction of this case, they are required to permit discovery so that the plaintiffs can demonstrate sufficient American contacts in this case. Lekkas v. Liberian M/V Caldonia 443 F. 2d. 10 (4 Cir. 1971).

This was a suit by three Greek seamen against a foreign flag vessel -the
Court said at page "11" :

"(1,2) In the exercise of sound discretion, a district court may decline jurisdiction of a suit in admiralty brought by foreign seamen against a foreign ship. But before acting, the district court should be fully informed about all factors that have a significant bearing on the question of retaining jurisdiction, including the allegiance of the shipowner. Hellenic Lines Limited, v. Rhoditis, 398 U.S. 306, 90 S. Ct. 1731, 26 L. Ed. 2d 252 (1970); Lauritzen v. Larsen, 345 U.S. 571, 587, 73 S. Ct. 921, 97 L. Ed. 1254 (1953). Valencia's explanation that the holders of its bearer stock are unknown is entitled to little credence. The corporation owns

only the CALEDONIA, and surely its officers and directors know who voted the stock at its annual meeting and the identity of the persons to whom they are responsible. When the owner asked the court to decline jurisdiction, it subjected itself, its agents and those to whom it entrusted the vessel to the obligation of furnishing on request all pertinent information for decision of its motion. "

" Vacated and remanded. "

Grammenos v. Lemos, 457 F. 2d 1067 (2 Cir. 1972)

This was also a suit by Greek seamen against the owners of a foreign flag vessel.

At page 1074 the Court made this statement :

"**** Discovery is being conducted on the remand from the companion case in Virginia, and the principles of the Lekkas case, controlling there, are applicable here. The court ought to give appellants an opportunity to substantiate their thesis that Lemos is an American resident who controls and is the beneficial owner of the Chariot; this inquiry will also determine his status as employer for purposes of Jones Act coverage. "

Up to this time the plaintiffs have been unable to follow through with their request for discovery. Under these decisions they should be permitted to continue this case in the District Court.

P O I N T III

RES JUDICATA AND COLLATERAL ESTOPPEL DO
NOT RESULT FROM A DECREE DISMISSING AN ACTION
SOLELY FOR LACK OF JURISDICTION

In the Puerto Rico case the motion of the defendants was labeled as a "motion to dismiss for lack of jurisdiction". At paragraph 5 of the motion dated November 27, 1973, the defendants made this statement "

" 5. That considering the above the Court should not exercise jurisdiction over the subject matter of this suit in relation to the Defendants appearing in this Motion."

Before filing an answer the defendants made this motion. It was a motion at the beginning of a lawsuit without an opportunity for the plaintiffs to develop the facts relating to the merits of the action. At no time did the defendants in Puerto Rico request summary judgment under F.R.C.P. Rule 56, or a judgment under F.R.C.P. Rule 12 (b). Neither in Puerto Rico nor in New York did the defendants file an answer or indicate specifically what the claimed adequate legal remedies are in the Republic of Colombia or in the Dominican Republic. Rule 41 (b) of the F.R.C.P. declares :

" **** Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. "

In Arrowsmith v. United Press International, 320 F 2d, 219 (2 Cir. 1963) this Court stated at page 221 "

" (1-3) We all agree it was error for the district court to proceed as it did. Not only does logic compel initial consideration of the jurisdiction over the defendant - a court without such jurisdiction lacks power to dismiss a complaint for failure to state a claim -- but the functional difference that flows from the ground selected for dismissal likewise compels considering jurisdiction and venue questions first. A dismissal for lack of jurisdiction or improper venue does not preclude a subsequent action in an appropriate forum, whereas a dismissal for failure to state a claim upon which relief can be granted is with prejudice. We shall therefore vacate the judgment dismissing the complaint for failure to state a claim on which relief can be granted and remand the case for consideration of the issue of jurisdiction over the person of the defendant and, in the event that this be found, the issue of venue, prior to consideration of the merits. ***".

In the Puerto Rico case the dismissal was not for failure to state a claim, but solely for lack of jurisdiction at the threshold of the case. The plaintiffs did not call any witnesses, submitted no proof on issues of unseaworthiness or negligence, did not bring in any documentary evidence to show the responsibility of the defendants for the sinking of the M/ V. CARIBE. After a jurisdictional defect is remedied, the plaintiffs can proceed with the action in another forum. A dismissal for failure to state a claim means that the plaintiffs cannot establish a cause of action and are barred. In Puerto Rico the Court considered only the jurisdictional objections at the outset of the case and did not go into the merits. Answers to the interrogatories of the plaintiffs were limited only to jurisdictional facts.

In the New York action the plaintiffs have shown adequate American contacts to warrant the application of American Law. Besides, they assert that further discovery will show American direction and control through the stockholders and officers of the defendant Caribbean Carriers Limited. The Court ruled in the case of United States v. McIntire 365 F. Supp 618, 624, (D.N.J. 1973) that a complaint may not be dismissed under Rule 12 (b) (6) unless it appears to a certainty that plaintiffs are entitled to no relief under any state of facts which could be proved in support of the claim. The Supreme Court of the United States observed in Conley v. Gibson 355 U.S. 41, 45 1957, "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of this claim which would entitle him to relief".

In Puerto Rico, based on lack of jurisdiction, the dismissal of the action did not touch the merits and gave the plaintiffs the right to institute another action in another forum. The dismissal in Puerto Rico and the subsequent decree of the Court of Appeals of the First Circuit did not make the dismissal res judicata.

Furthermore, the plaintiffs have alleged another cause of action in New York against the defendant Caribbean Carriers Limited (17a-18a) different from the one alleged in the Puerto Rico complaint. Because of the provisions of the Liberian Maritime Regulations (17a), the Liberian Maritime Law (17a) and the Geneva Convention (18a), the attempted trans-

fer of the ship to Dominican registry was invalid. In addition, Exhibit "F" of the defendants at page 122 of the appendix confirms this statement :

" A Certificate of Cancellation of Registry will be issued upon surrender to the Commissioner or a Deputy Commissioner of Maritime Affairs; or to a duly appointed agent of the Commissioner or a Deputy Commissioner of Maritime Affairs, of the vessel's currently valid Certificate of Registry (Item 9) and Ship Radio Station License (Item 11), and submission of the following additional documents and proofs : "

The defendant Caribbean Carriers Limited did not get a Cancellation of Registry, for the M. V. CARIBE.

The Liberian Registry was valid until 10/22/1971 -about 12 days after the MV CARIBE sank. For this reason Liberian Law should apply and not Dominican Law. Under Liberian Law, the courts are empowered to consider the "non-statutory General Maritime Law of the United States of America" (16a).

With reference to collateral estoppel, the Courts of New York State have recently considered this doctrine in Schwartz v. Public Administrator of County of Bronx , 24 N. Y. 2d 65 As the New York Court of Appeals declared at page 71 of its opinion :

"**** New York Law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling". (emphasis supplied). "

The New York action clearly indicates that the defendant Caribbean Carriers Limited was the true owner of the MV CARIBE , under Liberian Law, and the Geneva Convention (17-18a). This identical issue was not

before the Court in Puerto Rico nor in the Court of Appeals of the First Circuit. In Puerto Rico the only issue was lack of jurisdiction -the plaintiffs did not have the opportunity to prove their case through admissible evidence, oral testimony, and other documents. Considering the First Circuit opinion, its only effect is to keep the plaintiffs from instituting another action in Puerto Rico. They can bring another action elsewhere to have the merits of their case determined.

When the Court of Appeals of the First Circuit removed the words "with prejudice" from the judgment, it granted the relief plaintiffs requested. The judgment is by no means a bar to another action in a proper forum.

The attorney for the plaintiffs in New York does not agree with the unfortunate statement of Counsel in Puerto Rico (136a), because adequate contacts are present to give U.S. Courts jurisdiction; citizenship of owners (62a, 65a) financial operations in New York (70-115a) Liberian Registry calling for application of U.S. law (69a). Without the financial backing in the United States, the M. V. CARIBE could not sail and the shipping enterprise of the defendants would collapse. In Hellenic Lines v. Rhoditis, 398 U.S. 306, (1970), the Supreme Court held American Law applicable although the main stockholder of the shipowner company was a American resident and not a U.S. citizen; this Circuit held that American ownership is sufficient for deciding a case under American Law - Moncada v. Lemuria, 491 F. 2d 470, 472 (2 Cir. 1972).

Saylor v. Lindsley 391 F 2d 965, (2 Cir. 1968) set out the grounds on which a judgment can be res judicata at page 968 :

" (3-4) The requirement that a judgment, to be res judicata, must be rendered 'on the merits' guarantees to every plaintiff the right once to be heard on the substance of his claim. Thus, ordinarily, the doctrine may be invoked only after a judgment has been rendered which reaches and determines 'the real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction or form' Clegg v. United States, 112 F 2d 886, 887 (10 Cir. 1940), and, at common law, a dismissal on a ground which did not resolve the substantive merit of the complaint was not a bar to a subsequent action on the same claim. Hughes v. United States, 4 Wall. 232, 71 U.S. 232, 237, 18 L. Ed. 303 (1865); Halderman v. United States, 91 U.S. 584, 585-586, 23 L. Ed. 433 (1876). To this general rule, however, there are exceptions. One, embodied in Rule 41 (b) of the Federal Rules of Civil Procedure, provides that an involuntary dismissal for failure to prosecute, or for failure to comply with the Rules or any order of the court, shall operate, as an 'adjudication upon the merits', although the substantive issues of the case are never reached. This exception does not apply, however, in the case of a dismissal for lack of jurisdiction or for improper venue. "

See also Costello v. United States 365 U.S. 265, 286, (1961).

The plaintiffs did not satisfy the Puerto Rican Court solely on the pre-condition of jurisdiction. Supported by competent admissible evidence, their complaint states good causes of action which entitle them to a hearing on the whole case.

C O N C L U S I O N

1. The judgment of the U.S. D.C. S.D.N.Y. (127a), dismissing the plaintiffs' complaint should be reversed and the plaintiff permitted to continue with the lawsuit for a trial on the merits.
2. A hearing should be held in the District Court on the service of process by the plaintiffs on the defendants, and an opportunity given to the plaintiffs to perfect such service.
3. The plaintiffs be granted discovery to show that United States Law is applicable in this action .
4. Plaintiffs have not been given an opportunity to prove their case and the judgment of the U.S. District Court of Puerto Rico as modified by the Court of Appeals of the First Circuit does not constitute res judicata nor collateral estoppel in this action.

Respectfully submitted,

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RECEIVED

JUN 28 1976

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